No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

SAC AND FOX NATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF THE NAVAJO NATION AND THE PUEBLO OF LAGUNA AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

This case concerns Oklahoma's attempt to tax the income and motor vehicles of Sac and Fox tribal members who earn their income and garage their vehicles in Sac and Fox Indian country. In effect, Oklahoma urges that the Court distinguish prior cases invalidating analogous taxes solely because most of the Sac and Fox tribal territory is Indian country by virtue of 18 U.S.C. § 1151(b) and (c), rather than 18 U.S.C. § 1151(a), which identifies Indian reservations as one category of Indian country.

The Navajo Nation and Pueblo of Laguna govern and provide extensive governmental services for large areas

which carry no formal "reservation" designation. Much of the 2.8 million acre Navajo "checkerboard" area in New Mexico is outside formal reservation boundaries, but consists of an overwhelmingly Navajo land base and population, who depend on tribal and federal, rather than state, services.[1] The Pueblo of Laguna lands exceed 450,000 acres of restricted fee land, Executive Order reservation land, land acquired in trust under the Indian Reorganization Act, 25 U.S.C. § 465, and trust allotments within the tribal territory.[2]

Amici curiae Navajo Nation and the Pueblo of Laguna have vital interests in preserving immunities from state taxes in all of Indian country. Some of the lands of the Pueblo of Laguna are not formally designated as an Indian "reservation," but, rather, have the status of a

[1] The Navajo Nation government payroll exceeds $100,000,000. The states provide few services in Navajo Indian country. *See Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 834 n.1 (1982) (referring to the "tribal children abandoned by the State" in the off-reservation Ramah Navajo community); *Navajo Nation v. New Mexico*, 975 F.2d 741, 745 (10th Cir. 1992) (New Mexico's unlawful diversion of funds intended for Navajos under Title XX of the Social Security Act was motivated by "discriminatory intent"); *Pittsburg & Midway Coal Mining Co. v. Saunders*, No. CIV 86-1442 M (D.N.M. Aug. 22, 1988), reproduced at 909 F.2d 1387, Appendix C at 1437 (10th Cir. 1990) ("The contribution of the State of New Mexico is small .... The [Navajo] Tribe proved up many more indications, too numerous to detail here, of the dominance of the Navajo Nation over life" in a disputed reservation area in the Eastern Navajo Agency.), *rev'd on other grounds*, 909 F.2d 1387 (10th Cir.), *cert. denied*, 111 S. Ct. 581 (1990).

[2] United States Dep't of Commerce, *Federal and State Indian Reservations and Trust Areas* 359 (1974) (USGPO stock #0311-00076). *See Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958).

dependent Indian community under 18 U.S.C. § 1151(b).[3] Laguna tribal members occupied Pueblo lands before 1700, and members of the Pueblo work at tribal headquarters on land granted in fee by Spain. The Pueblo government not only provides traditional governmental services, but has also established on its lands Laguna Industries, Inc. and Laguna Construction Company, the two largest employers of its tribal members.

Similarly, the Ramah Navajo community is not formally designated as an Indian reservation, but is a dependent Indian community.[4] Under the federal policy favoring Indian self-determination and following this Court's invalidation of certain state gross receipts taxes in *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982), the Navajo Nation has made great advances in providing educational opportunities and governmental services to the Ramah Navajo community.

Many Navajo tribal members are employed by the Navajo Nation on other tribal trust lands with no formal reservation designation, and these tribal members are engaged not only in providing essential governmental services but also in, for example, farming on trust lands provided by Congress for the 110,630-acre Navajo Indian Irrigation Project. *See* Act of June 13, 1962, P.L. 87-482, 76 Stat. 96. These and other Navajo tribal trust lands "qualif[y] as a reservation for tribal immunity purposes." *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 910 (1991).

[3] *See United States v. Chavez*, 290 U.S. 357 (1933).

[4] *See United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971).

In addition, the Navajo Nation and the Pueblo of Laguna both exercise jurisdiction over trust allotments within their tribal territories. These allotments form a significant part of the tribal land base, and the tribes have acquired undivided fractional trust interests in hundreds of these allotments pursuant to the amended "escheat" provision of the Indian Land Consolidation Act, which promotes the return to tribal trust status of all allotments under tribal jurisdiction.[5]

Because of federal and state neglect, the Navajo Nation and Pueblo of Laguna face staggering housing and infrastructure deficits.[6] Thus, many tribal employees must live in off-reservation border towns and commute to tribal offices. Burdening further these tribal employees with state taxes on income derived solely from their tribal employment would seriously undermine the ability of the tribes to attract and retain the highly qualified tribal members needed for effective governmental operations and would dilute the already thin tribal tax base. *See Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976).

STATEMENT OF FACTS

In 1789, the United States "receive[d] into their friendship and protection, the nations of the . . . Sacs" *Treaty with the Wyandot, etc., 1789*, II Charles J. Kappler,

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[5] 25 U.S.C. § 2206. One court has observed that it is "only a matter of time" before the tribes will own all of the allotments. *See Irving v. Watt*, 11 Indian L. Rep. (Am. Indian Law. Training Program) 3009, 3010 n.2 (D.S.D. 1983), *rev'd on other grounds*, 758 F.2d 1260 (8th Cir. 1985), *aff'd*, 481 U.S. 704 (1987).

[6] *See* Paul E. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. Rev. 275, 278-80 (1991).

Indian Affairs: Laws and Treaties (hereinafter "II Kappler") 18, 21 (1904). Again, in 1804, the "United States receive[d] the united Sac and Fox tribes into their friendship and protection, and the said tribes agree[d] to consider themselves under the protection of the United States and no other power whatsoever." *Treaty with the Sauk and Foxes, 1804*, II Kappler at 74.

The 1804 Treaty, whereby a delegation of the Sac and Fox purported to cede Illinois and parts of two other states in exchange for gifts and $1000 in annuities, set the stage for future discord. William T. Hagan, *The Sac and Fox Indians* 21-25 (1958). Led by Sac warrior Black Hawk, the Sac and Fox joined the British in the War of 1812, defeating Zachary Taylor's command at Rock River in 1814. *Id.* at 67-72. After the war, the United States again sought peace with the Sac and Fox, and entered into treaties with the various bands. *Treaty with the Sauk, 1815*, II Kappler at 120; *Treaty with the Foxes, 1815*, II Kappler at 121; *Treaty with the Sauk, 1816*, II Kappler at 126. In conformity with the Treaty of Ghent, these treaties placed the tribes on the same footing as they stood before the war, and confirmed the 1804 Treaty. *See Treaty with the Sauk, 1816*, II Kappler at 126 (Preamble).

The United States entered into other treaties with the Sac and Fox in 1822, 1824, 1825 and 1830. II Kappler at 202, 207, 250 and 305. After Black Hawk's "British Band" of forty warriors routed a militia of three to four hundred men and after depredations by allied tribes were reported, President Jackson assigned Generals Winfield Scott and Henry Atkinson to subdue Black Hawk and his followers, which they did in 1832. *The Sac and Fox Indians* at 159-69. A party of Winnebagos captured Black Hawk, who was turned over to Colonel Zachary Taylor, who in turn placed Black Hawk under the guard of Lieutenant

Jefferson Davis. *Id.* at 195. Another treaty followed, ceding additional land. II Kappler at 349.

From 1832 to 1861, the United States entered into ten more treaties with the Sac and Fox, who moved from state to state and reservation to new reservation. *Id.* at 468, 473, 474, 476, 495, 497, 546, 631, 796 and 811. The final treaty with the Sac and Fox was ratified in 1868. *Treaty with the Sauk and Foxes, 1867*, II Kappler at 951. In it, the United States agreed to establish a new reservation for the Sac and Fox "in the Indian country south of Kansas," and to pay for subsistence "for the first year after their arrival at their new home in the Indian country." *Id.* at 952, 954.

The new Sac and Fox homeland remained intact for 23 years. In 1891, the Dawes Severalty Act was applied there, supported by only a "small minority" of tribal members. *The Sac and Fox Indians* at 255. Some tribal members selected contiguous allotments so that the allotments could continue to be used as common land. *Id.* at 257. However, most of the allotments were almost immediately leased to unscrupulous whites because of a lack of Indian capital and fractionated heirships. *Id.* at 257-58. Worse yet, Oklahoma unlawfully imposed a heavy tax burden on personal property and productive activity on the allotments. *Id.* at 258. Oklahoma's tax scheme prevented the Sac and Fox " 'from making improvements, has caused many to scatter and leave the Reservations, prevented others that were away from returning, demoralized and discouraged them from trying to advance in civilization.' " *Id.* (quoting an 1893 memorandum to the Commissioner of Indian Affairs).

Prior to 1936, the Bureau of Indian Affairs allowed tribal self-determination for the Sac and Fox "as long as it

was confined to innocuous matters." *Id.* at 259. In 1936, however, Congress abandoned the assimilationist philosophy for Indians in Oklahoma, and passed the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. §§ 501-509. The OIWA was intended to "permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the [Indian Reorganization Act of 1934]." H.R. Rep. No. 2408, 74th Cong., 2d Sess. 3 (1936). *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1443-46 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989); *Powers of Indian Tribes*, 55 I.D. 14 (1934).

Pursuant to the OIWA, the Sac and Fox reorganized their tribal government under a new constitution.[7] The Sac and Fox government is recognized by the United States. 44 Fed. Reg. 7235, 7236 (1979). Federal policies now support tribal self-determination and a government-to-government relationship between the tribes and the United States. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200-01 (1985).

Oklahoma seeks here to inaugurate a new, lower class of tribal governmental status for the Sac and Fox, solely because the Sac and Fox assertedly have no formally designated reservation boundaries.[8] State taxation of tribal members and their personal property in the Tribe's Indian country would do just that.

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[7] *Federal and State Indian Reservations and Trust Areas, supra* n.2, at 473.

[8] The United States holds 805 acres in trust for the tribe and over 17,000 acres of Sac and Fox allotments in trust status. *Federal and State Indian Reservations and Trust Areas, supra* n.2, at 472.

SUMMARY OF ARGUMENT

This case involves the applicability of state taxes to tribal Indians who work and own property in Indian country. The need to end the "case-by-case litigation which has plagued this area of the law" has been recognized. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 177 (1980) (Rehnquist, J., concurring and dissenting). The Court of Appeals correctly and succinctly applied the standards established by this Court; Oklahoma ignores them and would replace an examination of Congressional intent with a burdensome and unworkable series of individualized inquiries.

The Court has established a clear test for cases such as this one: state taxation of Indians in Indian country is unlawful unless Congress has expressly conferred that authority in unmistakably clear terms. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764-65 (1985). Oklahoma can point to no such Congressional authorization to tax the Sac and Fox. Rather, Oklahoma attempts to extend state taxation over Sac and Fox trust lands on the grounds that the Tribe's 1868 treaty reservation was disestablished and that the Sac and Fox Indians are sufficiently assimilated to shoulder the added burden. Petitioner's Brief at 12-14.

Oklahoma and the *amici curiae* supporting Oklahoma would have the courts conduct a "particularized inquiry into the state, federal and tribal interests" in each case where states seek to tax Indians in their tribal territory. Petitioner's Brief at 7; Brief of *Amicus Curiae* United States at 8; Brief of *Amici Curiae* Arizona, *et al.*, at 4. The United States would require the federal courts to determine which of the Indian people "live and work as part of a reservation community." Brief of *Amicus Curiae* United States at 20. Oklahoma and its *amici* would also

require the courts to determine the degree of assimilation of each putative Indian taxpayer. Petitioner's Brief at 13; Brief of *Amicus Curiae* United States at 19; Brief of *Amici Curiae* Arizona, *et al.*, at 11 n.6. Under Oklahoma's approach, what should be a focused examination of Congressional intent would degenerate into annual battles of expert anthropologists and sociologists arguing over which of the 2500 or so Sac and Fox are assimilated enough to be penalized by Oklahoma's taxes.

No such burdensome and demeaning hearings need be conducted. As long as the government of the Sac and Fox people "is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others' . . . separated from [state] jurisdiction." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 169 (1973), quoting *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867). Because Congress preserved all sovereign powers of the Oklahoma tribes in the Oklahoma Indian Welfare Act and because the Sac and Fox government is federally recognized, the assimilation issue is irrelevant. *McClanahan*, 411 U.S. at 172-73 & n.12; *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 476 (1976); *United States v. John*, 437 U.S. 634, 652-53 (1978). The "particularized inquiry into the state, federal and tribal interests" is appropriate only in cases involving state taxation of *non*-Indians. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *McClanahan*, 411 U.S. at 179; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 and 215 n.17 (1987).

McClanahan controls the income tax issue. Although Mrs. McClanahan earned her income within formal reservation boundaries, the reasoning of *McClanahan* encompasses all of Indian country and is in part predicated on Indian country legislation. *McClanahan*, 411 U.S. at 169 &

n.4, 177-79. The Court confirmed this in *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). Mrs. McClanahan worked for a private employer within Navajo Indian country. If, as this Court held, state taxes on her income infringed on the right of the Navajo people to make their own laws and be ruled by them, *McClanahan*, 411 U.S. at 179, then Oklahoma's taxes on the income of Sac and Fox Indians who work for the Sac and Fox Tribe in Sac and Fox Indian country must necessarily violate tribal sovereignty. Absent an act of Congress expressly allowing such taxes, they are unlawful.

The Court of Appeals properly discerned that Oklahoma seeks to evade the holding of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), by simply changing the characterization and means of collection of its motor vehicle taxes. This Court has previously rejected a similar attempt in *Colville*, 447 U.S. at 162-64, and should do so again.

No act of Congress authorizes Oklahoma's taxes of the Sac and Fox people or of Indian property in Sac and Fox Indian country. Thus, the state taxes are unlawful and the decision below should be affirmed.

ARGUMENT

I. "INDIAN COUNTRY" PROVIDES THE TERRITORIAL BENCHMARK FOR ALLOCATING FEDERAL, TRIBAL AND STATE GOVERNMENTAL AUTHORITY.

Congress first used the term "Indian country" in the original Trade and Intercourse Act of July 22, 1790, ch. 33, 1 Stat. 137 (1845). The term was not defined until the Act of May 19, 1796, ch. 30, 1 Stat. 469 (1845). In the 1796 act

and in those following it, "the term 'Indian country' is used as descriptive of the country within the boundary lines of the Indian tribes." Felix S. Cohen, *Handbook of Federal Indian Law* 6 (1942) (University of New Mexico Press reprint n.d.).

"Indian country" was defined again in the Act of June 30, 1834, ch. 161, 4 Stat. 729 (1846). This act included both civil provisions (trader licensing and passport requirements) and criminal provisions, and applied the same definition of "Indian country" to both. The Revised Statutes failed to include the 1834 "Indian country" definition and it was therefore repealed. Because of the statutory void, however, the Court continued to refer to the 1834 definition. *See United States v. John*, 437 U.S. 634, 649 n.18 (1978).

After 1834, in response to changing conditions, this Court expanded the scope of Indian country as defined in the 1796 act. *Id.* The Court focused on whether land was " 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' " *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 910 (1991), *quoting United States v. John*, 437 U.S. 634, 648-49 (1978). The Court determined that executive order reservations, off-reservation allotments, restricted fee allotments in Oklahoma, and other land set apart by the United States for the Indian people constituted Indian country. *Donnelly v. United States*, 228 U.S. 243 (1913) (executive order reservation); *United States v. Sandoval*, 231 U.S. 28 (1913) (Pueblo lands in New Mexico held in communal fee); *United States v. Pelican*, 232 U.S. 442 (1914) (allotment in disestablished reservation); *United*

States v. Ramsey, 271 U.S. 467 (1926) (restricted fee allotment in Oklahoma); *United States v. McGowan*, 302 U.S. 535 (1938) (land set aside for Reno Indian Colony).

Congress has plenary authority in Indian affairs, *e.g.*, *Tiger v. Western Investment Co.*, 221 U.S. 286, 311 (1911), and in 1948 Congress codified the Court's Indian country decisions. 18 U.S.C. § 1151. *See* Reviser's note following 18 U.S.C.A. § 1151 (West 1984). Soon thereafter, Congress demonstrated its understanding that "Indian country" defines the area where state criminal and civil laws generally do not apply. Section 2 of the Act of August 15, 1953, ch. 505, 67 Stat. 588, known as P.L. 280, provided that five states – not including Oklahoma – would have jurisdiction over violations of the states' criminal law in the "areas of Indian country" listed. *See* 18 U.S.C. § 1162(a). Section 4 of P.L. 280 provided that the same five states would have "jurisdiction over civil causes of action . . . in the areas of Indian country listed." 28 U.S.C. § 1360(a).

In 1968, Congress amended P.L. 280 to require tribal consent before states could assume jurisdiction in Indian country. Again, Congress used the term "Indian country" in describing the territory over which state criminal and civil jurisdiction could be extended with tribal consent. 25 U.S.C. §§ 1321(a), 1322(a). Accordingly, this Court concluded that Congress intended "Indian country" to define generally the limits of state authority in civil matters involving Indian interests. *See Williams v. Lee*, 358 U.S.

217, 220-23 & n.6 (1959); *Kennerly v. District Court*, 400 U.S. 423, 424-25 & n.1 and 427-29 (1971); *McClanahan*, 411 U.S. at 177-78.

This Court unequivocally affirmed this conclusion in 1975. Citing *Williams*, *Kennerly*, and *McClanahan*, the Court in *DeCoteau v. District County Court*, stated:

> While [18 U.S.C.] § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.

420 U.S. 425, 427 n.2. The Court recently confirmed the vitality of this conclusion. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987). The tribal territory is, and has been for more than 200 years, "Indian country." *Felix S. Cohen's Handbook of Federal Indian Law* 27 (R. Strickland ed. 1982).[9] The reservation "bright line" posited by Arizona, Brief of *Amici Curiae* Arizona, *et al.*, at 11, is an illusion. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 111 S. Ct. 905, 910 (1991). The proposition that Indians are protected from state taxation only on formally designated reservations ignores the many other ways by which the United States has set aside lands for the use and benefit of Indian people.

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[9] *Accord Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1165 n.1 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2009 (1991); *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1390 (9th Cir. 1988); *Indian Country U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988); *Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373, 379 n.31 (4th Cir. 1980). *See Judicial and Departmental Construction of the Words "Indian Reservation"*, II Op. Solic. Interior Dep't 1378 (1945) (neither the courts nor the Department of the Interior have ever attempted to define the term "Indian reservation"; both have been more concerned with the definition of "Indian country").

II. CONGRESS HAS NOT AUTHORIZED OKLAHOMA TO TAX SAC AND FOX TRIBAL MEMBERS EMPLOYED IN SAC AND FOX INDIAN COUNTRY.

A. *McClanahan* Applies throughout "Indian Country."

The wage earner in *McClanahan* worked within reservation boundaries. The analysis of *McClanahan* shows that the reservation context was significant not in and of itself, but because reservation lands are "Indian country."

After discussing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which held that states may not extend their criminal laws to the tribal territory, the Court in *McClanahan* stated:

> Although Worcester on its facts dealt with a State's efforts to extend its criminal jurisdiction to reservation lands,[4] the rationale of the case plainly extended to state taxation within the reservation as well.

411 U.S. at 169. In elaborating on the meaning of the term "reservation lands," footnote four cited to three cases: *Williams v. United States*, 327 U.S. 711 (1946); *United States v. Chavez*, 290 U.S. 357 (1933); and *United States v. Ramsey*, 271 U.S. 467 (1926). *Id.* These three pre-1948 cases represent the three types of "Indian country" codified in 18 U.S.C. § 1151: reservations (*Williams*), dependent Indian communities (*Chavez*) and trust or restricted allotments (*Ramsey*).

The Court's discussion of P.L. 280 also reflects the controlling effect of Indian country status. The *McClanahan* Court noted that P.L. 280 "expressly provides that the State must act 'with the consent of the tribe

occupying the particular *Indian country*,' 25 U.S.C. § 1322(a)[17]" in order to assume civil and criminal jurisdiction over Indians. 411 U.S. at 177 (emphasis added). Footnote 17 then explains that P.L. 280 delegated to certain states "civil and criminal jurisdiction over Indian *reservations*." (Emphasis added.) The Court thus appears to use the terms "Indian country" and "reservation" interchangeably in *McClanahan*.

If there were any questions about the basis for the Court's holding in *McClanahan*, the Court soon provided ample clarification. In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Court faced questions of a state court's subject matter jurisdiction in consolidated civil and criminal cases involving Indians. *DeCoteau*'s analysis was predicated on the proposition that "[w]hile [18 U.S.C.] § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction. *McClanahan v. Arizona State Tax Comm'n*." *DeCoteau*, 420 U.S. at 427 n.2. In the same footnote, *McClanahan* is also cited as authority for the observation that "[e]ven within 'Indian country,' a State may have jurisdiction over some persons or types of conduct, but this jurisdiction is quite limited." *Id.*

Thus, the *McClanahan* analysis governs in cases where Indians are employed in Indian country. Oklahoma concedes here that the Sac and Fox lands are Indian country and under Sac and Fox jurisdiction. Petitioner's Brief at 14. The inquiry must focus, therefore, on whether Congress has expressly provided that Oklahoma's tax laws shall apply to the Sac and Fox. *McClanahan*, 411 U.S. at 170-71; *Bryan v. Itasca County*, 426 U.S. 373, 376 (1976); *County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683, 688 (1992). Congress must make its intent to allow such

state taxes " 'unmistakably clear.' " *County of Yakima*, 112 S. Ct. at 688, quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764-65 (1985) (referring to state taxation of Indians "within their own territory").

B. The 1891 Sac and Fox Allotment Agreement Does Not Grant Oklahoma the Power to Tax the Income of Tribal Members Employed in Indian Country.

Oklahoma relies on the Sac and Fox Allotment Agreement, Act of February 13, 1891, ch. 165, 26 Stat. 749, as the sole source of congressional authority for its taxing power over the Sac and Fox, and asserts that Oklahoma's income tax is "not pre-empted . . . because the Sac and Fox Allotment Agreement does not preclude the extension of state law." Petitioner's Brief at 12. However, the mere *absence* of a Congressional statement *precluding* taxes hardly constitutes an unmistakably clear expression by Congress that state taxes *shall* apply. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766-67; *Bryan v. Itasca County*, 426 U.S. at 389. *Cf. County of Yakima*, 112 S. Ct. at 693-94 (statute authorizing "taxation of . . . land" does not authorize taxation of the proceeds from sale of former Indian trust land).

Oklahoma's view of the effect of the application of the Dawes Severalty Act to the Sac and Fox in 1891 conflicts directly with decisions of this Court and with historical fact. *See, e.g., DeCoteau*, 420 U.S. at 446 (trust allotments in disestablished reservation were meant to "provide an adequate fulcrum for tribal affairs" and are under "exclusive tribal and federal jurisdiction"); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478-79 (1976). *Accord Ahboah v. Housing Auth. of Kiowa Tribe*, 660

P.2d 625, 627-29 (Okla. 1983). The Oklahoma Organic Act "expressly preserved tribal authority and federal Indian jurisdiction" throughout all of Oklahoma. *Felix S. Cohen's Handbook of Federal Indian Law* 773 (R. Strickland ed. 1982). "In passing the enabling act for the admission of the state of Oklahoma, . . . Congress was careful to preserve the authority over the Indians, their lands and property, which it had prior to the passage of the act." *Tiger v. Western Investment Co.*, 221 U.S. 286, 309 (1911). "Since statehood [in 1907], the status of Indian tribes in Oklahoma has been similar to that of tribes in other states." *Felix S. Cohen's Handbook of Federal Indian Law* 774 (R. Strickland ed. 1982).

> Although the land base of the tribes in Oklahoma has been reduced by the allotment process, their inherent powers of self-government over those areas that remain Indian country are undiminished. Neither the General Allotment Act nor most of the special allotment and cession agreements and statutes of individual tribes limit powers of self-government.

Id. at 779-80.[10]

As a substitute for an act of Congress authorizing Oklahoma's taxes on the Sac and Fox, Oklahoma urges the Court to engage in a "particularized inquiry into the nature of state, federal, and tribal interests at stake."[11] However, this inquiry is appropriate only when states seek to tax *non*-Indians doing business in Indian country. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136,

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[10] This Court has recognized the 1982 Cohen treatise as a "leading treatise" in Indian law. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855 n.17 (1985).

[11] *See* Petitioner's Brief at 7; Brief of *Amici Curiae* Arizona *et al.*, at 4; Brief of *Amicus Curiae* United States at 8.

144-45 (1980); *McClanahan*, 411 U.S. at 179; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 and 215 n.17 (1987) (In cases involving state taxation of tribal members "[i]t is unnecessary to rebalance these interests in every case.").

C. The Same Considerations Which Confirmed the Holding in *McClanahan* Apply to This Case.

1. THE TREATY

The Sac and Fox, like the Navajo, entered into treaties with the United States. In the 1868 Treaty with the Sac and Fox, the United States agreed to provide a "new home" for the Tribes, on a tract of land of about 750 square miles. Delegations of the Tribes assisted in the selection of the new Sac and Fox homeland. The reservation was set apart for them by the United States in the Indian Territory, *i.e.*, the area "set apart for the sole use and occupation of various Indian tribes." *Atlantic and Pacific R.R. v. Mingus*, 165 U.S. 413, 435 (1897). *See* Petitioner's Brief at 8.

The 1868 treaty does not explicitly state that the Sac and Fox were to be exempt from state taxes, but neither did the Navajo treaty. *McClanahan*, 411 U.S. at 174. Given the circumstances surrounding the execution of the Sac and Fox Treaty, it should similarly be construed as precluding state taxation of Sac and Fox tribal members in their own territory.

Plainly, the opening of the Sac and Fox reservation in 1891 has implications with respect to assertions of possible Sac and Fox sovereignty over non-members residing in the reservation area. *See Brendale v. Confederated Yakima*

Indian Nation, 492 U.S. 408 (1989); Joseph L. Singer, *Sovereignty and Property*, 86 NW. U. L. Rev. 1 (1991). However, this case concerns only the right of the Sac and Fox people, who work on land held in trust for them by the United States, to "make their own laws and be ruled by them." *McClanahan*, 411 U.S. at 172. Because the income of the Sac and Fox tribal members is "derived wholly from reservation sources," their activities are "totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." *McClanahan*, 411 U.S. at 179-80. *See County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683, 689 n.2 (1992).[12]

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[12] Amici Curiae Arizona, et al., err in two respects when they assert that an Indian must both work *and live* within a reservation to qualify for the *McClanahan* exemption. First, amici curiae miscite their principal authority, which deals with application of state tax laws in Indian country, not just in "reservations." *See Felix S. Cohen's Handbook of Federal Indian Law* 406 (R. Strickland ed. 1982). *Cf.* Brief of Amici Curiae Arizona, *et al.*, at 8 & n. 3. Second, amici curiae then apply the "usual rules" to questions of taxation of Indians. *Id.* at 8-11. The "usual rules" do not apply to such cases, however. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 & n.4 (1985).

In cases involving the taxation of income earned by Indians, only the location of the place of work matters. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (both referring to the Indians' exemption from state taxes on "income from activities carried on within the boundaries of the reservation"). *Cabazon* shows that this exemption applies to income earned in all of Indian country. 480 U.S. at 207 n.5.

2. THE ENABLING ACT

The Court in *McClanahan* also considered the provision of the Arizona Enabling Act which disclaimed "absolute jurisdiction and control" over Indian lands. *McClanahan*, 411 U.S. at 137. Oklahoma made equivalent disclaimers. *Tiger v. Western Investment Co.*, 221 U.S. 286, 309 (1911); Act of June 16, 1906, ch. 3335, 34 Stat. 267-68, 270, 272, 273.

3. PUBLIC LAW 280

The Court in *McClanahan* found that Arizona's failure to amend its constitution pursuant to P.L. 280 to allow its courts to adjudicate civil and criminal matters arising in Indian country "would seem to dispose of this case." *McClanahan*, 411 U.S. at 179. Likewise, Oklahoma chose not to accept the burdens implicit in the acceptance of such jurisdiction. *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir. 1990). Thus, like Arizona, Oklahoma has no authority over Indians in Indian country in civil cases,[13] criminal cases,[14] or regulatory matters.[15]

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[13] *E.g., Ahboah v. Housing Auth. of Kiowa Tribe*, 660 P.2d 625 (Okla. 1983) (state courts not authorized to adjudicate forcible entry and detainer action on trust allotment in disestablished reservation); *Housing Auth. of the Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990); *Richardson v. Malone*, 762 F. Supp. 1463 (N.D. Okla. 1991).

[14] *E.g., Cravatt v. State*, 825 P.2d 277 (Okla. Crim. App. 1992); *State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989); *C.M.G. v. State*, 594 P.2d 798 (Okla. Crim. App.), *cert. denied*, 444 U.S. 992 (1979).

[15] *Indian Country U.S.A., Inc. v. Oklahoma*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988). *See* letter (with attached legal analysis) from Robert E. Layton, Jr., Regional Administrator for the United States Environmental Protection Agency, to Mark S. Coleman, Deputy Commissioner for Oklahoma's Environmental Health Services (Sept. 8, 1991), informing Oklahoma of its lack of authority to regulate environmental activties in "Indian country" in Oklahoma; *Washington v. United States Envtl. Protection Agency*, 752 F.2d 1465, 1467 n.1 (9th Cir. 1985).

4. IMPLICATION OF NARROWER STATUTES AUTHORIZING STATE TAXATION OF INDIANS

Oklahoma's position is further weakened by the presence of "narrower statutes authorizing States to assert tax jurisdiction over reservations, . . . explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization." *McClanahan*, 411 U.S. at 177. Some of these narrower statutes address the taxability of Oklahoma Indians. *See, e.g., Choteau v. Burnet*, 283 U.S. 691, 694-95 (1931).

5. THE BUCK ACT

The Buck Act authorized the application of state taxes within "federal areas," but continued the exemption for "any Indian not otherwise taxed." 4 U.S.C. § 109. This exemption protects the Sac and Fox tribal members earning their income in the Sac and Fox Indian country, just as it protected the wage earner in *McClanahan*, who worked on a reservation. *See McClanahan*, 411 U.S. at 177-78.

Indians were not mentioned in the original Buck Act bill, H.R. 6687. 84 Cong. Rec. 10,094 (1939). The Department of the Interior then sought to exclude

"Indian reservations" from the coverage of the bill,[16] and Senator LaFollette proposed an amendment to exempt from the bill "any transaction occurring in whole or in part within an Indian reservation." 84 Cong. Rec. 10,907 (1939).

In hearings on H.R. 6687 in 1940, New Mexico objected to Senator LaFollette's proposed amendment. *Hearings Before a Subcommittee of the Senate Committee on Finance on H.R. 6687* (hereinafter "*Hearings*"), 76th Cong., 3d Sess. 2 (1940). New Mexico Representative Dempsey, on behalf of the New Mexico Governor, acknowledged that Indians were already "exempt from taxation" and emphasized that New Mexico had "no objection whatsoever to prohibiting the sales tax applying to Indians." *Id.* at 19. He explained that New Mexico feared that exempting the reservations themselves would create tax havens for non-Indians who would move their stores to Indian lands. *Id.* He equated "reservations" and "Indian lands" with lands purchased by the federal government for the Indians and other non-taxable land in McKinley County, where, as Representative Dempsey noted, "there are scarcely any lands . . . except for the city of Gallup, that are not Indian lands." *Id.* Much of the Indian land to which Dempsey referred is off-reservation trust allotments. S. Rep. No. 436, 74th Cong., 1st Sess. 3 (1935).

The Interior Department reiterated its position that transactions on Indian reservations be exempted from the bill. *Hearings* at 38-40. Senator George suggested that the Interior officials confer with the State authorities to arrive at acceptable language. *Id.* at 40.

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[16] Letter from Acting Secretary of the Interior to Hon. Pat Harrison (Aug. 1, 1939), *reprinted in* 84 Cong. Rec. 10,685 (1939).

The Committee ultimately reported out the bill with language consistent with New Mexico's position, that "any tax on or from any Indian not otherwise taxed" would continue to be preempted. S. Rep. No. 1625, 76th Cong., 3d Sess. 4 (1940).[17] The Committee amendment was enacted into law *verbatim* and is codified at 4 U.S.C. § 109.

Two things are significant in this legislative history. First, Representative Dempsey's explanation of the situation in McKinley County shows that the exemption from state taxes was understood to apply to off-reservation Indian country. Second, Congress rejected the view that the tax exemption should be confined by formal reservation boundaries and confirmed the long established federal policy of excepting *Indians* from state taxation.

This is the only pertinent legislative history on 4 U.S.C. § 109. Its clear thrust is to affirm that Indians on Indian land are exempt from state taxes. A construction of the Buck Act excepting Indians from state taxes on wages earned within all of Indian country is consistent with the language of the statute, all of the pertinent legislative history, and the traditional canons of construction of statutes intended to benefit Indians. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

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[17] "Indians not taxed" means "those who [hold] tribal relations." *Elk v. Wilkins*, 112 U.S. 94, 112 (1884) (Harlan, J., dissenting). *Cf. id.* at 108 (majority opinion distinguishing for citizenship purposes "Indians not taxed" from those who "have totally extinguished their national fire," have "lost the power of self-government," and who were "never recognized by the treaties or legislative or executive Acts of the United States as distinct political communities").

D. Oklahoma's Terminationist Arguments Implicate Issues Within the Exclusive Authority of Congress.

"For most current purposes, judicial deference to findings of tribal existence is still mandated by the extensive nature of congressional power" in Indian affairs. *Felix S. Cohen's Handbook of Federal Indian Law* 3 (R. Strickland ed. 1982); *United States v. Rickert*, 188 U.S. 432, 445 (1903) ("It is for the legislative branch of the government to say when these Indians will cease to be dependent .... That is a political question, which the courts may not determine."); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866). This Court has consistently held that Indian status is not a racial category, but a political one. *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974). Oklahoma fails to respect this constitutional principle when it argues that "assimilated" Indians are not entitled to the protections of federal law even though they are members of a federally recognized tribe.

When Congress *has* determined that the level of acculturation of an Indian is relevant to his political status, it has established commissions in the Executive Branch to make these determinations. Indeed, the cases on which Oklahoma relies deal with Indians who received "Certificates of Competency" pursuant to such Congressional authority. *E.g., Choteau v. Burnet*, 283 U.S. 690 (1931); *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936).[18] *See Elk v. Wilkins*, 112 U.S. 94, 103-06 (1884). Because of Congress' traditional role in this essentially

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[18] *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), allowed state taxation only of cash, securities, and personal property solely for estate tax purposes.

political function, the Court should approach most cautiously a request to rule on the political status of Indians.

If this Court were to accept Oklahoma's argument, courts will be required to define what it is to be an Indian in a wholly new manner. Oklahoma argues that Indians there are generally assimilated enough to warrant removal of traditional tax exemptions.[19] *McClanahan* forecloses such a contention. The Sac and Fox are plainly *not* "Indians who have left *or* never inhabited reservations set aside for their exclusive use *or* who do not possess the usual accoutrements of tribal self-government." *McClanahan*, 411 U.S. at 167 (emphasis added). Like the Shawnees in *The Kansas Indians*, the Sac and Fox government, by virtue of the Oklahoma Indian Welfare Act, is "preserved intact, and recognized by the political department of the government." *Id.* at 169. *See Tenneco Oil Co. v. Sac and Fox Tribe*, 725 F.2d 572, 577 (10th Cir. 1984) ("[T]he Sac and Fox Tribe is possessed of substantial sovereign authority and rights of self-government.") (McKay, J., concurring); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989). Nor have the Sac and Fox "left the reservation *and* become assimilated into the general community," a situation where the Indian sovereignty doctrine has been less

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[19] Petitioner's Brief at 13. We do not believe that tribal sovereignty is dependent on an uneducated, impoverished membership. However, even accepting Oklahoma's anachronistic notions of assimiliation, we note that as of 1974 the average grade level achieved by the Sac and Fox was 6th grade, while the Navajo – which Oklahoma characterizes as "unassimilated" – had an average eighth grade education. *Federal and State Indian Reservations and Trust Areas, supra* n.2, at 85 and 473. The educational level of the Sac and Fox stands in sharp contrast to Oklahoma's assertion that the Sac and Fox have "little to distinguish them from all other citizens." Petitioner's Brief at 13.

"rigidly applied." *McClanahan*, 411 U.S. at 171. This case concerns income earned by tribal members working in the Sac and Fox tribal territory, within the area reserved for them by the 1868 Treaty. Any voluntary conferral by Oklahoma of rights, privileges and services to individual Sac and Fox members is irrelevant under *McClanahan*. *Id.* at 172-73 & n.12. *Accord Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 476 (1976).

Oklahoma and its *amici* would disregard *McClanahan* and subject the courts to endless hearings on whether the Indians function as a "reservation community,"[20] and on whether any putative Indian taxpayer is sufficiently educated and assimilated that she might be stripped of her status as a "true" Indian.[21] This position is wholly incompatible with *United States v. John*, 437 U.S. 634, 652-53 (1978). Oklahoma not only would impose an intolerable burden on the courts, it would also defeat the federal policies supporting tribal self-determination. Even in ambiguous instances, the "courts 'are not obliged . . . to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'" *Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976), quoting *Santa Rosa*

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[20] *See* Brief of Amicus Curiae United States at 7, 8, 18, 19, 20, 23 & n.20, 24. The United States repeatedly employs, but never defines, the phrases "reservation community" and "coherent reservation community" and the phrases have no basis in prior decisions of this Court. For one to determine that an Indian is a part of a "reservation community," the following facts are sufficient: (1) the United States recognizes the government of the Tribe and (2) the Indian is an enrolled member of that Tribe. The geographical component of a "reservation community" is "Indian country" as defined in 18 U.S.C. § 1151.

[21] *See* Petitioner's Brief at 13-15; Brief of *Amici Curiae* Arizona *et al.*, at 11 n.6; Brief of *Amicus Curiae* United States at 20.

Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).[22]

III. OKLAHOMA'S ATTEMPT TO CIRCUMVENT *MOE* SHOULD BE REJECTED.

A. Oklahoma's Vehicle Excise Tax May Not Be Imposed on Vehicle Transfers Occurring Within Indian Country.

A determinative factor in assessing the validity of Oklahoma's Vehicle Excise Tax on Indian vehicles is the situs of the transaction being taxed. *See Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 163 (1980). If the transaction takes place within the tribal territory the state is without taxing jurisdiction absent congressional authorization. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), *citing McClanahan*. As discussed above, this Court's analysis in *McClanahan* applies throughout Indian country.

Petitioner's Vehicle Excise Tax ignores the situs of the transaction. This Court has recognized that Congress has addressed the business of Indian commerce on reservations so comprehensively "that no room exists for state laws imposing additional burdens upon traders." *Central Machinery v. Arizona Tax Comm'n*, 448 U.S. 160, 164 (1980), *citing Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965). Oklahoma's Vehicle Excise Tax is one

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[22] *See United States v. Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981) ("Federal policy has sometimes favored tribal autonomy and sometimes sought to destroy it. . . . A degree of assimilation is inevitable under these circumstances and does not entail the abandonment of distinct Indian communities."), *cert. denied*, 454 U.S. 1143 (1982).

such state law for which no room exists when the transfer of legal ownership occurs in Indian country.

B. Oklahoma's Vehicle and License Registration Fee Is an Unlawful Tax on Property Within Indian Country.

The annual registration fee imposed under the Oklahoma Vehicle License and Registration Act is a tax on the value of property held within Indian country and cannot be reconciled with established case law.[23]

Oklahoma is attempting to impose what it refers to as a "fee" of 1¼% of the vehicle's factory delivered price for the first year. Petitioner's Brief at 18. This fee is reduced to ninety percent of the previous year's fee in the following years. Under the guise of a registration fee, Oklahoma effectively imposes a property tax based on value. While Oklahoma chooses to call its property tax a license and registration fee, the nature of the tax must be determined by its operation rather than particular descriptive language which may have been applied to it. *Educational Films Corp. v. Ward*, 282 U.S. 379, 387 (1931).

This Court has refused to allow states to impose taxes on motor vehicles owned by tribal members living on trust lands, regardless of the designation of the tax. In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), Washington attempted to impose taxes which were denominated as excise taxes for the privilege of using a vehicle in the state. Each tax was

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[23] For an early case, see, *United States v. Rickert*, 188 U.S. 432 (1903) (invalidating state taxes on, *inter alia*, horses stabled on trust allotments).

assessed annually at a certain percentage of fair market value and imposed on the owners of motor vehicles, including vehicles owned by the Tribe and its members for uses both on and off the reservation. *Colville*, 447 U.S. at 162. The Court previously invalidated Montana's personal property tax as applied to motor vehicles owned by tribal members residing on their reservation, relying on *McClanahan*'s holding that such taxation is " 'not permissible absent congressional consent.' " *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 475-76 (1976). Washington's attempt to avoid *Moe* by characterizing its tax as an excise tax rather than as a property tax was rejected by this Court. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 163.

In this instance, Oklahoma's Vehicle and License Registration Fee is a property tax imposed on vehicles owned by Sac and Fox tribal members and garaged in Sac and Fox Indian country. In the absence of Congressional consent, Oklahoma may not impose a property tax and call it a fee and accomplish what *Colville* and *Moe* have prohibited. *Colville*, 447 U.S. at 163; *Moe*, 425 U.S. at 480-81.

CONCLUSION

If lands are validly set apart for the use of the Indians as such, they qualify as a reservation for tribal immunity purposes. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 910 (1991). The Sac and Fox allotments have been validly set aside, as has the tribal trust land. *See United States v. Pelican*, 232 U.S. 442 (1914); *Citizen Band Potawatomi, supra*. The lands at issue here constitute the Sac and Fox Indian country.

State taxation of the income and property of Indians in their Indian country is unlawful absent an act of Congress expressly authorizing such taxation. No such statute exists here. The decision of the Court of Appeals should therefore be affirmed.

Respectfully submitted,

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